Supreme Court
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No. 97-1686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SUZANNE CAHNMANN, on Behalf of Herself and All Others Similarly Situated,

Petitioner,

v.

SPRINT CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF OF PETITIONER

Petitioner, Suzanne Cahnmann, submits this Reply brief to address an issue newly raised by the respondent, Sprint Corporation, in its Brief in Opposition to the Petitioner's requested Writ of Certiorari.

Sprint's assertion that the "significance and likely recurrence of the issues" presented in our Petition for Certiorari are diminished by (1) an FCC Order gradually eliminating "the filed tariff regime for nondominant interexchange (i.e., long distance) carriers like Sprint," and (2) this Court's pending decision in *AT&T Corp. v. Central Office Tel., Inc.*, No. 97-679 (argued March 23, 1998) is wrong and misleading. (Br. in Opposition at 8, n.1).

On the first point, the D.C. Circuit Court of Appeals has already determined that the FCC detariffing order is likely to be invalid.[1] This alone undermines Sprint's claim that the detariffing order diminishes the likely recurrence of the filed tariff doctrine in other cases.

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[1] Sprint acknowledged that the order has been stayed, but neglected to explain why, or even give a cite to the case granting the stay. (Opposition Br. at 8 n.2). Nonetheless, we were able to track down the case and circumstances surrounding the stay. On February 13, 1997, the court entered an order staying the detariffing order. *MCI Telecom. Corp. v. FCC*, No. 96-1459 (D.C. Cir.). The stay was entered on the motion of MCI Telecommunications Corporation who opposes the mandatory detariffing order. In entering the order, the Court found MCI had "satisfied the stringent standards for a stay" set forth in *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1997). The first stringent requirement was the likelihood that MCI will prevail on the merits. *Id.*

Moreover, Sprint has taken the opposite position in its challenge to the order. Sprint neglected to inform the Court that it is one of the parties suing the FCC to enjoin the enforcement of the detariffing order. In that case, Sprint claims the order is "arbitrary, capricious, in violation of the Communications Act of 1934 as amended (47 U.S.C. § 151 *et seq.*) and otherwise contrary to law." *Sprint Corp. v. FCC,* No. 97-1009 (D.C. Cir.) Sprint's Pet. for Review at 2 (filed Jan. 7, 1997).

Moreover, even if the detariffing order, as amended,[2] is upheld, it will not alleviate the filed tariff issues presented in this case. Rather, it will increase frequency of the issues recurring. Contrary to Sprint's representation, the order does not fully eliminate the filed tariff regime. It actually eliminates the filed tariffs for certain types of services, while allowing "permissive detariffing" for other types of services.[3]

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[2] *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as amended, Order on Reconsideration,* CC Docket No. 96-61 (FCC 97-293) (Aug. 15, 1997) (hereinafter "FCC Detariffing Order" or "Detariffing Order"). Although Sprint was unquestionably aware of the additional amendments, since it was one of the parties to the reconsideration proceedings, it neglected to cite these amendments, and instead made its representations to this Court based on the order as it stood prior to the amendments.

[3] *FCC Detariffing Order* at ¶¶ 32, 36. "Permissive detariffing" allows, but does not require the carrier to file a tariff. This will clearly create additional cases calling on the courts to decide whether state law claims asserted against carriers arise under federal law, since a carrier could contract for one rate, and then file a tariff to the contrary. The carriers themselves have noted, that even where they have a rate filed, that rate would no longer be the only rate allowed by law. *Id.* at ¶ 8.

Additionally, even where the filed tariff is "eliminated" there will still be a tariff in effect for up to 45 days for customers who choose or switch their long distance service by notifying their local exchange carrier, rather then notifying the long distance carrier directly.[4] Thus the implications of the detariffing order are, in reality, additional reasons why this case is of such importance that the Court should grant our Petition for Certiorari.

On the second point, the pending case, *AT&T Corp. v. Central Office Tel. Inc.* does not deal at all with the jurisdictional issue presented here, on which the Circuits are split, of whether state law contract and consumer fraud claims asserted against a long distance carrier arise under federal law.[5]

Finally, Sprint wrongly downplays the split among the Circuits by ignoring the decisions against jurisdiction. We candidly documented that several Circuits had found jurisdiction while others had rejected it. Sprint cites only those cases, which we already cited, from six Cir-

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[4] *FCC Detariffing Order* at ¶¶ 39-44.

[5] As set forth in the Petitioner's Brief in *AT&T v. Central Office Tel. Inc.*, the issue presented in that case is "Whether, consistent with a line of decisions from this Court extending from *Chicago & Alton R.R. v. Kirby*, 225 U.S. 155 (1912), *Davis v. Cornwell*, 264 U.S. 560 (1924), to *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), the federal filed tariff requirements of Section 203 of the Communications Act of 1934 preempt state law claims that a customer of a regulated common carrier is entitled to better, costlier, and more valuable services than required by the terms of the governing tariff, and received by similarly situated customers?" Brief of Petitioner, *AT&T v. Central Office Tel. Inc.*, No. 97-679 (1997), at i.

cuits which have found jurisdiction and simply ignores the Circuits holding against jurisdiction.[6] (Br. in Opposition at 8-9). The cases speak for themselves.

CONCLUSION

In sum, neither the FCC Detariffing Order, nor the *Central Office Tel.* case diminish the likelihood that the issues presented in the Petitioner's Petition for Certiorari will recur, nor will they resolve the issues. The split among the Circuits will remain, and continue to require the expenditure of substantial judicial resources.

Accordingly, the Petitioner prays the Court grant her requested Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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[6] Sprint does not cite any authority from the First, Ninth or Tenth Circuits. As our Petition for Certiorari shows, the First and Ninth Circuits hold against jurisdiction and the district courts in the Tenth Circuit are split. *See*, Pet. for Cert. at 12-17. Sprint has cited cases in the Third and Eleventh Circuits, which we also cited, holding there is jurisdiction, but ignores the cases in those Circuits holding against jurisdiction. *See, id.* at 14, 17.